

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**MURTALA MOHAMMED ALHASSAN**

Claimant

VS.

**HENRY INDUSTRIES, INC.**

AND

**SILMANG KONARE**

Respondents

AND

**COMMERCE & INDUSTRY INS. CO.**

Insurance Carrier

AND/OR

**WORKERS COMPENSATION FUND**

Docket No. **1,039,435**

**ORDER**

Claimant requests review of the June 26, 2008 preliminary hearing Order entered by Administrative Law Judge Bruce E. Moore.

**ISSUES**

The Administrative Law Judge (ALJ) found claimant failed to sustain his burden of proof that he was either an employee of respondent Silmong Konare (Konare) or a statutory employee of respondent Henry Industries, Inc. (Henry). The ALJ denied claimant's request for benefits.

Although claimant's request for review raised the single issue whether claimant's accidental injury arose out of and in the course of employment with either respondent, nonetheless his brief raised the issues whether an employee-employer relationship existed between claimant and respondent Konare or respondent Henry.

Respondent Henry argues claimant is a self-employed independent contractor rather than an employee of Konare. And claimant is not a statutory employee of Henry. Respondent Henry requests the Board to affirm the ALJ's Order.

Workers Compensation Fund (Fund) argues that claimant is a statutory employee of Henry and therefore the Fund is not liable for any of claimant's benefits. In the alternative, claimant is an independent contractor for respondent Konare and is not covered under the Kansas Workers Compensation Act (Act).

The issues for Board review are whether claimant was an employee of Konare or a statutory employee of Henry.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the whole evidentiary record filed herein, this Board Member makes the following findings of fact and conclusions of law:

The ALJ's preliminary hearing Order sets out findings of fact that are detailed, accurate and supported by the record. It is not necessary to repeat those findings of fact herein. This Board Member adopts the ALJ's findings of fact as if specifically set forth herein.

Briefly stated, Henry is a courier brokering service that matches companies that need their products delivered with contractors and courier services to deliver the products. Routes are established and the contractors bid to perform the delivery services on particular routes. Respondent Konare obtained several routes and then entered into a separate agreement with claimant to perform the delivery service on one of the routes. Claimant was injured in an automobile accident while riding with another individual that he was apparently training to make the deliveries for him.

Claimant contends he is an employee of respondent Konare. Respondent Henry contends claimant was an independent contractor for the purposes of the Act.

In workers compensation litigation, it is the claimant's burden to prove his entitlement to benefits by a preponderance of the credible evidence.<sup>1</sup>

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<sup>1</sup> K.S.A. 2007 Supp. 44-501 and K.S.A. 2007 Supp. 44-508(g).

It is often difficult to determine in a given case whether a person is an employee or an independent contractor because there are, in many instances, elements pertaining to both relationships that may occur without being determinative of the actual relationship.<sup>2</sup> There is no absolute rule for determining whether an individual is an independent contractor or an employee.<sup>3</sup>

The relationship of the parties depends upon all the facts, and the label that they choose to employ is only one of those facts. The terminology used by the parties is not binding when determining whether an individual is an employee or an independent contractor.<sup>4</sup>

The test primarily used by the courts in determining whether the employer-employee relationship exists is whether the employer had the right of control and supervision over the work of the alleged employee and the right to direct the manner in which the work is to be performed, as well as the result that is to be accomplished. It is not the actual interference or exercise of control by the employer, but the existence of the right or authority to interfere or control that renders one a servant, rather than an independent contractor.<sup>5</sup>

In addition to the right to control and the right to discharge the worker, other commonly recognized tests of the independent contractor relationship are:

- (1) The existence of a contract to perform a piece of work at a fixed price.
- (2) The independent nature of the worker's business or distinct calling.
- (3) The employment of assistants and the right to supervise their activities.
- (4) The worker's obligation to furnish tools, supplies and materials.
- (5) The worker's right to control the progress of the work.
- (6) The length of time the employee is employed.
- (7) Whether the worker is paid by time or by job.

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<sup>2</sup> *Jones v. City of Dodge City*, 194 Kan. 777, 402 P.2d 108 (1965).

<sup>3</sup> *Wallis v. Secretary of Kans. Dept. of Human Resources*, 236 Kan. 97, 689 P.2d 787 (1984).

<sup>4</sup> *Knoble v. National Carriers, Inc.*, 212 Kan. 331, 510 P.2d 1274 (1973).

<sup>5</sup> *Wallis* at 102 & 103.

(8) Whether the work is part of the regular business of the employer.<sup>6</sup>

The Administrative Law Judge analyzed the facts in pertinent part:

The right to control, supervise, and direct an alleged employee's work is the primary test for determining an employer/employee relationship. Falls, 249 Kan. at 64. Almost all of the above factors favor an independent contractor relationship. Both Konare and Henry Industries, Inc., and Konare and Alhassan had an agreement for the delivery of a specific route for a fixed price. Delivery companies and courier services (e.g., United Parcel Service, Federal Express, United States Postal Service) are commonplace and exist independent of the merchants, brokers and clients who utilize them. Both Konare and Alhassan had the unfettered right to hire assistants, or delegate their responsibilities to subcontractors. Both Konare and Alhassan were obligated to provide, and did provide, their own tools, supplies and materials. Henry Industries, Inc. did not control the progress of the performance of the work. Konare was free to modify the route in any way he saw fit, as long as he met the route's contractual requirements for timeliness of deliveries. Similarly, Konare did not monitor nor control Alhassan's performance of the delivery route, as evidenced by Konare's lack of knowledge that Alhassan was delegating, or preparing to delegate, delivery responsibilities to Allilasisi. The time factors were determined by the clients of Henry Industries, Inc., and varied by route. Those factors were set forth in the proposal at the time the route was put up for bid. Henry Industries, Inc. did not control the time elements for any route. Contract holders were paid by the route, not by time, mile or number of stops, although time, mileage, number of stops and size of deliveries were renegotiated in arms length transactions between Henry Industries, Inc. and Konare. Similarly, Konare merely deducted a percentage of what he was paid for a route and paid his subcontractors, including Alhassan, the balance. The percentage withheld by Konare was subject to negotiation in arms length negotiations between Konare and Alhassan. All payments made by Henry Industries, Inc. were made without withholding any taxes, and were evidenced by 1099 forms. Konare did not withhold any taxes from Alhassan, but apparently did not issue a 1099 to evidence his payments to Alhassan.<sup>7</sup>

The ALJ concluded that the evidence failed to establish an employer-employee relationship between Konare and Henry or between Alhassan and Konare. This Board Member agrees and affirms.

Claimant next alleges that he was a statutory employee of Henry. K.S.A. 44-503(a) extends the application of the Workers Compensation Act to certain individuals and entities

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<sup>6</sup> *McCubbin v. Walker*, 256 Kan. 276, 886 P.2d 790 (1994).

<sup>7</sup> ALJ Order (Jun. 26, 2008) at 6.

who are not the immediate employers of an injured worker.<sup>8</sup> The purpose of the statute is to give employees of a sub-contractor a remedy against a principal contractor and to prevent employers from evading liability under the act by contracting with outsiders to do work which they have undertaken as a part of their trade or business.<sup>9</sup> The statute provides:

Where any person (in this section referred to as principal) undertakes to execute any work which is a part of the principal's trade or business or which the principal has contracted to perform and contracts with any other person (in this section referred to as the contractor) for the execution by or under the contractor of the whole or any part of the work undertaken by the principal, the principal shall be liable to pay to any worker employed in the execution of the work any compensation under the workers compensation act which the principal would have been liable to pay if that worker had been immediately employed by the principal; . . .<sup>10</sup>

There is a two-part test to determine whether the work which caused the injury is part of the principal's trade or business, i.e. (1) is the work being performed by the injured employee necessarily inherent in and an integral part of the principal's trade or business? (2) is the work being performed by the injured employee such as is ordinarily done by employees of the principal? If either of the foregoing questions is answered in the affirmative the work being done is part of the principal's trade or business, and the injured employee is a statutory employee of the principal.<sup>11</sup>

The ALJ analyzed the evidence in the following manner:

The court concludes that neither test is met in the case at bar. There is no evidence before the court that Henry Industries, Inc. delivers pharmaceuticals or medical supplies to retail clients, or that delivery of those supplies is necessarily inherent in and an integral part of the trade or business of Henry Industries, Inc. While Henry Industries, Inc. does make delivery of wholesale products, it is not engaged in the retail delivery business. There is no evidence that Henry industries, Inc. was contractually obligated to make any retail deliveries whatsoever. There is no evidence before the court that a member of the general public can call Henry Industries, Inc. and obtain delivery of pharmaceuticals or medical products, or that delivery of retail products is 'necessarily inherent in' the brokerage of delivery contracts, Henry Industries, Inc.'s trade or business. Nor is there any competent evidence before the court that retail delivery of pharmaceuticals or medical products

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<sup>8</sup> *Hollingsworth v. Fehrs Equip. Co.*, 240 Kan. 398, 729 P.2d 1214 (1986).

<sup>9</sup> *Bright v. Cargill, Inc.*, 251 Kan. 387, 837 P.2d 348 (1992); *Atwell v. Maxwell Bridge Co.*, 196 Kan. 219, 409 P.2d 994 (1966).

<sup>10</sup> K.S.A. 44-503(a).

<sup>11</sup> *Hanna v. CRA, Inc.*, 196 Kan. 156, 409 P.2d 786 (1966).

is 'ordinarily' performed by employees of Henry Industries, Inc. Henry Industries, Inc. has chosen to limit its trade or business to wholesale transactions. Its involvement in retail transactions is limited to brokering agreements between retail consumers and independent drivers, courier services and delivery companies for the delivery of medical products. Its income is derived from commissions earned in brokering those agreements, not from the actual delivery of those products.<sup>12</sup>

The ALJ concluded that claimant failed to establish that he was a statutory employee of Henry. This Board member agrees and affirms.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.<sup>13</sup> Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2007 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.<sup>14</sup>

**WHEREFORE**, it is the finding of this Board Member that the Order of Administrative Law Judge Bruce E. Moore dated June 26, 2008, is affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of August 2008.

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HONORABLE DAVID A. SHUFELT  
BOARD MEMBER

c: Bradley A. Pistotnik, Attorney for Claimant  
Robert Wonnell, Attorney for Henry Industries, Inc. & AIG  
Thomas D. Arnhold, Attorney for Workers Compensation Fund  
Bruce E. Moore, Administrative Law Judge

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<sup>12</sup> ALJ Order (Jun. 26, 2008) at 8.

<sup>13</sup> K.S.A. 44-534a.

<sup>14</sup> K.S.A. 2007 Supp. 44-555c(k).